(3)

No. 08-1359

Supreme Court, U.S.
FILED
MAR 3 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEBORAH L. FISHER,

Petitioner,

v.

HARRY VAN LOVEREN M.D.; BRAD OSBORNE, M.D.; MAYFIELD NEUROLOGICAL INSTITUTE, INC.; THE GOOD SAMARITAN HOSPITAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, HAMILTON COUNTY

BRIEF IN OPPOSITION FOR RESPONDENT GOOD SAMARITAN HOSPITAL

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the issue of the length of the pendency of the action was never raised in the direct Appeal to the State Court of Appeals and, in any event, the Respondents were confronted with the same delay and Petitioner was permitted to try and prove her case, and could not?

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Petitioner's valid claims are only against Ohio and must be brought in the Ohio Court of Claims subject to its provisions, otherwise the State is immune?

3. Whether Petitioner has presented compelling reasons to grant the Petition, where the Trial Court properly applied an Ohio Supreme Court's ruling to the action at-hand?

4. Whether Petitioner has presented compelling reasons to grant the Petition, where the settled law in Ohio concerning *respondeat superior* does not apply?

5. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ohio Supreme Court has set forth the law on agency which directly applies to the current and pending case?

6. Whether Petitioner has presented compelling reasons to grant the Petition, where there are no material facts at issue?

7. Whether Petitioner has presented compelling reasons to grant the Petition, where the issues surrounding the creation of an operative report does not support a cognizable claim?

PARTIES TO THE PROCEEDING

Bradley Mullen, M.D., listed in the petitioner's caption, is no longer a party in this matter.

STATEMENT PURSUANT TO RULE 29.6

Respondent Good Samaritan Hospital is wholly owned by Catholic Health Initiatives.

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STATEMENT OF THE CASE

A. Procedural Background

Petitioner Fisher filed a medical malpractice Complaint in the Hamilton County Common Pleas Court on December 17, 1991. The Complaint named as Defendants, Dr. Harry Van Loveren, Mayfield Neurological Institute, Dr. Brad Mullen, Dr. Brad Osborne and Good Samaritan Hospital.

Dr. Mullen immediately filed a Motion to Dismiss / Motion for Summary Judgment arguing that he was a State employee of the University of Cincinnati. Dr. Mullen was voluntarily dismissed by Fisher from the action shortly thereafter.

The remaining Defendants filed Motions for Summary Judgment as there was no expert evidence of any asserted malpractice. After Fisher requested additional time to conduct discovery, the Trial Court granted all Motions except that portion of the Motion for Summary Judgment of Good Samaritan Hospital based on an asserted apparent agency potential liability for Dr. Mullen, the State employee.

Fisher's malpractice claims against Dr. Mullen and liability of the University of Cincinnati have been litigated in the Ohio Court of Claims, where valid claims against the State of Ohio must be brought, subject to the parameters of the statutory law pursuant to which Ohio has specifically waived its immunity. In the action filed by Fisher in the Court of Claims against the University of Cincinnati and Dr. Mullen, the Court of

Claims found that Dr. Mullen was acting within the scope of his employment with the University of Cincinnati. The Court of Claims, therefore, determined that Dr. Mullen was entitled to personal immunity pursuant to Ohio Revised Code § 2743.02(F) and Ohio Revised Code § 9.86 for medical malpractice allegedly committed while Dr. Mullen was treating Fisher. *Fisher v. University of Cincinnati*, 1998 WL 542701 (Ohio App. 10th Dist.).

The Tenth District Court of Appeals, in its Decision dated August 25, 1998, affirmed the Decision of the Court of Claims and reiterated Dr. Mullen was entitled to personal immunity.

The Court of Claims action by Fisher against the University of Cincinnati apparently continues. The Court of Claims case concerns the action of the UC employee, Dr. Mullen, relative to his care given to Fisher. In the Court of Claims, while the State of Ohio has waived its immunity defense on such a claim, there is no right to jury trial pursuant to statute under the Court of Claims Act.

A Second Motion for Summary Judgment was filed in this action by Good Samaritan Hospital, after determination by the Twelfth District Court of Appeals concerning the immunity of Dr. Mullen. The Trial Court granted Good Samaritan Hospital's Motion for Summary Judgment. The Trial Court correctly held that Good Samaritan Hospital's potential vicarious liability for Dr. Mullen's asserted malpractice had been extinguished and that, therefore, no liability could flow through to the Hospital on an agency theory.

Fisher timely appealed the Decision to the First District Court of Appeals. The First District Court of Appeals affirmed the judgment of the Trial Court as to all Defendants.

Fisher petitioned the Ohio Supreme Court to accept jurisdiction over this case. The Ohio Supreme Court denied jurisdiction on January 28, 2009.

B. Relevant Facts

The University of Cincinnati maintained the only neurological residency program in the Cincinnati area in 1990 and 1991. Attending physicians from University Hospital supervised University of Cincinnati neurosurgical residents who rotated through Good Samaritan Hospital at that time.

Good Samaritan Hospital contracted with the University of Cincinnati to provide neurological services to Good Samaritan Hospital when Fisher was a patient on or around December 20, 1990 through January 8, 1991. Dr. Brad Mullen was the University of Cincinnati neurosurgical resident who rotated through Good Samaritan Hospital and who was involved with some of the care of Fisher.

Dr. Mullen was never an employee of Good Samaritan Hospital. Rather, Dr. Mullen was always an employee of the University of Cincinnati at the time treatment was provided to Fisher.

From December 20, 1990 through January 8, 1991, the University of Cincinnati was an independent contractor for purposes of providing neurosurgical services to patients at Good Samaritan Hospital.

Fisher was admitted to Good Samaritan Hospital on December 18, 1990, and on December 20, 1990 underwent surgery by Dr. Van Loveren for removal of a brain tumor. Following the operation, she continued under the care of Dr. Van Loveren with the assistance of Dr. Osborne, a resident physician in the employ of Good Samaritan Hospital. Care was also provided by Dr. Mullen. On or about December 24, 1990, Fisher's neurological condition deteriorated and required emergency and urgent care by her physicians.

Recognizing that Dr. Mullen was an employee of the University of Cincinnati and, therefore, an employee of the State, and that any claims against the State must be brought in the Court of Claims, Dr. Mullen was voluntarily dismissed from this action by Fisher. The Trial Court granted the individual doctor-Defendant's Motions for Summary Judgment, correctly finding that Fisher failed to present any expert testimony that Dr. Van Loveren or Dr. Osborne deviated from the appropriate standards of medical care.

The Trial Court originally denied Good Samaritan Hospital's Motion for Summary Judgment because of the suggested deviation on the part of Dr. Mullen. The Trial Court suggested such deviation may create a *respondeat superior* liability issue as to Good Samaritan Hospital.

In the meantime, Fisher filed a claim in the Court of Claims against Dr. Mullen and the University of Cincinnati. The Court of Claims determined that Dr. Mullen was entitled to absolute immunity for Fisher's claims against him. Specifically, the Court of Claims held that: (1) Dr. Mullen was a State employee; (2) Dr. Mullen was an employee of the University of Cincinnati at the time of the action in question; and, (3) Dr. Mullen was entitled to absolute immunity as a State employee and employee of the University of City and, therefore, the University of Cincinnati was liable for the actions or inactions of Dr. Mullen. Such claim, as it is really against the State of Ohio, must proceed in the Court of Claims subject to its provisions.

The Tenth District Court of Appeals, in its Decision dated August 25, 1998, affirmed the Decision of the Court of Claims.

On September 14, 2005, the Ohio Supreme Court issued its Decision in *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005). The Ohio Supreme Court held that, if an agent is not and cannot be liable because of an affirmative defense, settlement or a favorable judgment, no liability exists to flow through to the secondary party, i.e., a hospital under an agency theory. Hence the Trial Court granted Good Samaritan Hospital's Motion for Summary Judgment, and the decision was affirmed on appeal.

REASONS FOR DENYING THE PETITION

The State Court decisions in this case do not conflict with any decision of this Court or any Federal Court of Appeals, nor do they involve any issues other than State law applied to a particular set of facts in a State Court proceeding.

Further, Fisher's position that the length of pendency of this case before the Ohio Trial Court is somehow a "due process violation" is an issue that was not seasonably raised during the state review process, that is, raising the issue as an assignment of error in the State Court of Appeals. Although there is absolutely no due process violation, and the delay affected both parties, this Court does not decide asserted constitutional issues where the assertions have not been timely raised in accordance with the requirements of State law. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Additionally, the Ohio Supreme Court has ruled on the issues raised by Fisher in her Petition. For instance, the lack of an agency relationship between Good Samaritan Hospital and the State employee, Dr. Mullen, has been decided by the Ohio Supreme Court in *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005). Matters of State law should be left to the State Supreme Court, and the Ohio Supreme Courts' rulings which directly apply to this case must stand. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Finally, Fisher specifically requests this Court review the Ohio's sovereign immunity and Ohio's Court of Claims process, whereby Ohio has granted through the

Ohio Court of Claims Act, under certain circumstances, the ability to sue the State in the Court of Claims where otherwise there is immunity, but there is no right to jury trial. Again, the State's immunity and its parameters for waiving that immunity are the province of the State and its legislature, not Federal "super review" over states' immunity rights.

Even if this was a topic subject to this Court's review, which it is not, the issue is not involved here in any event as Good Samaritan Hospital was properly dismissed by the Ohio Common Pleas Court as a matter of law. Any arguments of Fisher about the Court of Claims procedure should be raised in that action involving the City of Cincinnati.

Finally, Fisher's arguments for review in this Court are belied by the facts, the well-established law of Ohio case law and Ohio statutes applicable to the action at-hand.

There is simply no compelling need for this Court to address any of the issues or non-issues raised in Petitioner Fisher's questions presented herein. Fisher has not in any way carried her burden of demonstrating any "compelling reasons" for the Petition herein to be granted. *See Sup. Ct. R. 10.*

Because Dr. Mullen was properly granted summary judgment by the Trial Court and his dismissal is not contested in this Petition, he is not mentioned specifically herein.

Finally, as only the first three questions of Fisher raised in her brief involve Good Samaritan Hospital, these three issues are refuted in the following arguments. Insofar as Fisher's other arguments affect Co-Respondents, Co-Respondents' arguments contained in their brief are incorporated herein.

ARGUMENTS OPPOSING CERTIORARI

I. There Is No Unilateral "Due Process" Violation Based On The Length Of Pendency Of This Case As The Delay Applied To Both Parties, And In Any Event The Issue Was Waived.

Fisher first maintains that "justice delayed is justice denied". Fisher complains of the length of the pendency of the action before the Trial Court. First, this issue was never raised in the direct appeal of this case to the First District Court of Appeals of Ohio. It was therefore never seasonably raised in accordance with the requirements of State Appellate law, and is waived. Further this Court does not hear issues procedurally deficient.

In any event, Fisher's contentions concerning the length of time in which this case languished before the Trial Court is irrelevant. The Defendants were confronted with the same delay as the Plaintiff in the Trial Court. The bottom line, however, is that Fisher was permitted to try and prove her case, which she could not. Both factually and legally, her claims against all of the Defendants / Respondents were properly dismissed.

II. Fisher Is Pursuing Her Appropriate But Sole Remedy In The Ohio Court Of Claims, And No "Right To Jury Trial Was Waived Without Knowledge", As Fisher Has No Right To A Jury Trial On Her Claims Against The State Of Ohio.

Fisher's contention is that she can sue Good Samaritan Hospital in Ohio's Common Pleas Court, and therefore she is entitled to a potential jury trial in the Ohio State Trial Court, even though the sole basis for the suit is an "agent by estoppel" theory regarding the actions of an immune State employee, Dr. Mullen. Fisher suggests that Good Samaritan has some kind of liability for an immune doctor who is not even its employee. This is not the law and in fact the law in Ohio well- settled to the contrary.

The Ohio Court of Claims has previously determined that Dr. Mullen is entitled to absolute immunity for Fisher's claims against him. Specifically, the Court of Claims in the Tenth District Court of Appeals held that Dr. Mullen was an employee of the University of Cincinnati and, therefore, a State employee at the time of the action in question. Hence, Fisher filed suit against the University of Cincinnati in the Court of Claims for asserted recovery of the alleged malpractice of Dr. Mullen.

Yet, Fisher also maintains that she has a direct claim in Ohio's Common Pleas Court, against Good Samaritan Hospital for the actions of Dr. Mullen, a doctor who is not its employee, and is immune.

The Ohio Supreme Court held in *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005), that if the agent is not and cannot be liable because of an affirmative defense, settlement or favorable judgment, no liability exists to flow through to the secondary party, i.e., the hospital, under any agency theory.

"Agency by estoppel" is a derivative claim of vicarious liability and the liability of a hospital must flow through the agent or independent contractor-physician. Agency by estoppel is not a direct claim against the hospital.

In *Comer*, the Ohio Supreme Court held that the expiration of the statute of limitations on a medical malpractice negligence claim against the agent extinguished all liability against the principal. Plaintiff's sole theory in *Comer* against the Hospital was based upon agency by estoppel relationship between the hospital and two treating physicians who allegedly misinterpreted the Plaintiff's X-ray films. The doctors were not parties because the statute of limitations expired. As in the case presented here, the Plaintiff in *Comer* was pursuing a direct claim against the hospital premised solely upon the negligence of agents who could not be found liable. The Ohio Supreme Court determined in *Comer* that there was no actionable claim against the hospital since there was no actionable claim against the agent.

Agency by estoppel is not a direct claim against the hospital, but is an indirect claim for the vicarious liability of the agent. There can be no viable claim for agency by estoppel when the statute of limitations against the

agent has expired. Otherwise, the hospital becomes primarily responsible under what is, in effect, strict liability or liability without fault.

Here, statutory immunity is the vehicle that bars this action against the agent, Dr. Mullen. Good Samaritan Hospital cannot be held vicariously liable for the actions of the apparent agent, Dr. Mullen, because he is immune from liability under Ohio Revised Code § 2743.02(F) and Ohio Revised Code § 9.86.

The Ohio Supreme Court in *Comer* has held that it would be improper to create a new and direct cause of action that would impose primary liability upon a hospital, which would violate principals that form the basis of vicarious liability. *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005).

Dr. Mullen cannot be held liable since he has been dismissed from this case, has been adjudged statutorily immune as a State employee acting within the course and scope of his employment.

Unlike the *Comer* case, however, Fisher does have an alternative remedy. Fisher is pursuing a case in the Ohio Court of Claims to recover for the alleged misconduct of Dr. Mullen. The State of Ohio employed Dr. Mullen, served as its principal, and can be accountable for his conduct in the Court of Claims only if negligence is found. Because Dr. Mullen's liability has been extinguished by the Court of Claims, there is no source upon which the Trial Court can impose a secondary liability upon Good Samaritan Hospital.

As Fisher's claims for vicarious liability against Good Samaritan Hospital are not viable, she has no right to any trial, let alone a jury trial.

Further, the Ohio Supreme Court has held that there is no violation of any constitutional right to a jury trial in an action against the State of Ohio in the Court of Claims. See *Pokorny v. Local No. 310*, 38 Ohio St.2d 177, 311 N.E.2d 866 (1974). Fisher cannot defeat Good Samaritan Hospital's liability defenses by arguing she has a right a jury trial when such a right does not exist.

In any event, Fisher's case was properly dismissed as a matter of law by the Trial Court. She is entitled to no trial jury or otherwise against Good Samaritan Hospital.

III. The Ohio Supreme Court's Decision In *Comer*, Directly On Point, Applies To Fisher's Complaint.

Fisher asserts in her third question presented, that there is an improper "retroactive application" of new case law.

It is well-settled in the State of Ohio that a decision by the Ohio Supreme Court is and has always been the law of the State. *State ex rel. Bosch v. Industrial Commission of Ohio*, 1 Ohio St.3d 94, 98, 438 N.E.2d 415 (1982). The Ohio Supreme Court's decision in *Comer* is directly on point with Fisher's arguments and defeats them.

Fisher suggests that she had "vested rights" of pursuing a claim against Good Samaritan Hospital prior

to *Comer*. She is mistaken. It has never been the law in Ohio that a secondary party can be held liable when an agent is and cannot be held liable because of an affirmative defense, settlement or favorable judgment. Here, Dr. Mullen is immune. How then can Good Samaritan Hospital be subject to liability for the actions of Dr. Mullen, when he is immune?

To illustrate the absurdity of Fisher's argument, she seems to maintain that when an Appellate Court issues a decision in a particular action, that decision would not apply to the pending case in which the decision is announced, as the action was filed before the decision was made. It appears Fisher is confusing retroactive application of statutes and analysis related thereto, as contrasted with case law.

The Ohio Supreme Court decision of *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005) applies to this case, and mandates dismissal of Good Samaritan Hospital. The Ohio case law is clear and on point. The seemingly endless Appellate road of this case must end.

CONCLUSION

Respondents Good Samaritan Hospital and Bradley Mullen respectfully request that the Petition be denied.

Respectfully submitted,

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